United Nations AT/DEC/1153

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1153

Case No. 1203: POUDEL Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Charu Chandra Poudel, former staff member of the United Nations Population Fund (hereinafter UNFPA), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 2001 and thereafter until 30 September 2001;

Whereas, on 29 June 2001, the Applicant Poudel filed an Application requesting the Tribunal, inter alia:

"5. ...

(3) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for denial of due process;

(4) to order that: the Applicant be reinstated; the Applicant be paid retroactively for the period from 1 January 2001 until the date of reinstatement; the period of 15 August 2000 to 31 December 2000 be treated as special leave without pay, as a disciplinary measure; or to order that the Applicant be paid three years base salary in lieu of reinstatement;

(5) to order the Respondent to pay the Applicant damages in the amount of one year of net salary for damage to his reputation."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 29 November 2002;

Whereas, on 25 July 2003 the Tribunal decided to postpone consideration of the case until its autumn session.

Whereas the facts are as follows:

The Applicant entered the service of UNFPA on a fixed-term appointment as Assistant Programme Officer at the NO-A level, in Kathmandu, Nepal Country Office, on 2 January 1987. At the time of the events relating to the Application, he held a permanent appointment as Assistant Representative at the NO-B level, UNFPA, Kathmandu.

On 8 October 1999, the Applicant and four colleagues, all of whom were employed in the UNFPA Nepal Country Office and were members of its Procurement Committee, wrote to the Chief, Office of Oversight and Evaluation, UNFPA, informing him of alleged irregularities and violation of procurement rules and procedures at the Country Office. They held the UNFPA Representative responsible, and maintained they had been coerced by him into compliance. They requested an investigation of the matter.

As a result of the complaint, the Office of Audit and Performance Review (OAPR), United Nations Development Programme (UNDP), constituted a special audit team on 10 November 1999, "to perform auditing and forensic work on the procurement activities, including construction works and other procurement activities" undertaken by the UNFPA Office in Nepal.

The report of the OAPR special audit team entitled "disciplinary and performance related matters" concluded that there was evidence of unsatisfactory conduct on the part of the Applicant, and recommended that disciplinary action be initiated against him. In particular, it noted that he had signed minutes of meetings of the Local Procurement Committee which had not been held; he had improperly received a commission of 1,000,000 rupees from another staff member, and had not reported it until after he had returned it a few days later; and that he had failed to exercise his oversight and supervisory authority over certain of his subordinates, which resulted in "major financial and procurement irregularities". The Applicant was provided with a copy of the report on 18 February 2000, asked to provide comments by

6 March and warned that failure to provide a satisfactory explanation would result in his case being submitted to the Disciplinary Committee. The Applicant responded on 2 March, stating that another staff member, the Administrative Assistant, had prepared the minutes under the direction of the Representative and that he (the Applicant) had been subjected to harassment until he agreed to sign them. With respect to the bribe, he claimed that the Administrative Assistant had given him one million rupees, which he returned a few days later. He had delayed reporting it because he was unsure to whom he should make such a report; and upon ultimately reporting the bribe to the Representative, the latter had decided not to take action. The Applicant stated that he had drawn the attention of the auditor's to the matter. Insofar as his supervisory functions were concerned the Applicant explained that the Representative had prevented proper supervision to be exercised at the office.

On 3 March and again on 9 March 2000, the Applicant requested written copies of written statements made by himself and his colleagues in connection with the Special Audit" as well as audio cassettes containing interviews given to members of the audit team. These requests were not honoured.

On 10 April 2000, the Applicant was charged with the following "accountability and disciplinary charges":

> "A. Signing minutes of the Contracts Committee meetings which did not take place;
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> B. Failing to comply with UNFPA procurement procedures in 1998 and 1999, by participating in the irregular award of a contract to the architect ... and to the sub-contractors involved in the construction projects;
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> C. Failing, in the absence of [the Representative] while on leave or on mission, to exercise proper supervisory authority over subordinates involved in procurement, leading to overpayments to sub-contractors and to the architect in the order of 15 to 38% over market price;
>
> D. Failing ... to immediately report the receipt of a bribe from [the Administrative Assistant]."

On 27 and 28 June 2000, the Applicant was permitted to listen to the tape recording. He was sent a copy of the transcript on 28 June.

On 28 June 2000, the UNFPA Representative, *a. i.*, advised the Applicant that he was being suspended from duty with pay, with immediate effect. He was informed that certain audiotaped conversations involving himself and two other staff members,

as well as a statement that he had collected bribes, were considered to have established *prima facie* evidence of serious misconduct on his part, and corroborate his participation in a bribery scheme, as well as in other violations of the most basic standards of conduct, financial rules and procedures. The Applicant was advised that these allegations were in addition to those with which he had already been charged but that no decision would be taken on any of the charges until his full comments were received. He was given until 18 July to respond. The Applicant denied the allegations registered against him in his response of 18 July, and asserted that the audiotaped conversation had no legal standing or evidentiary value as it had been "maliciously, illegally" recorded without official authorization and lacked proper authentication. He contended that the dialogue recorded merely constituted an attempt on the Applicant's part to lure the Administrative Assistant into exposing the existance of other bribery attempts as well as the complicity in these improprieties by the Representative.

The Officer-in-Charge of UNDP responded on 15 August 2000, stating, inter alia,

> "On the legality of [the] evidence, with or without the tape recording, there are many witnesses corroborating your conversation during this March 2000 meeting. You have admitted being present at that meeting, and you have never denied the substance of the discussions that took place. In the Organization's view, this tape recording, together with other evidence, constitutes valid and sufficient proof of the tenor of the conversation, which all witnesses recognize took place. ...
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> ...
>
> For the above reasons, it has been decided to reject as untrustworthy your explanations of 17 April and 17 July 2000 on the various charges laid against you, and ... to summarily dismiss you from service under Staff Regulation 10.2, effective on the date of this letter..."

The Applicant requested that his case be referred to the Joint Disciplinary Committee for review. Pursuant to his request, the case was referred to an *ad hoc* Disciplinary Committee (DC) on 26 October 2000. During the course of the proceedings, a video-conference was arranged in Bangkok in order to enable the Applicant and his counsel to cross-examine the Administrative Assistant who remained in Nepal. The Administrative Assistant could not be found on the appointed day of the conference and the conference proceeded in his absence. The AHDC submitted its report on 23 November 2000. Its findings and recommendation read, in part, as follows:

"... **THE FINDINGS, INDICATING WHICH, IF ANY, APPEAR TO BE SUPPORTED BY THE EVIDENCE**

A. In signing documents of Contracts Committee meetings that did not take place, [the Applicant] conspired to conceal the irregularities that were occurring in the UNFPA Nepal office;

B. As member of the Contracts Committee, [the Applicant] had a role not only in reviewing but also of approving the recommendations of the committee to the UNFPA Representative. In so doing, he failed to comply with UNFPA procurement procedures in 1998 and 1999 and participated in the irregular award of a contract to the architect ... and to the sub-contractors involved in the construction projects;

C. [The Applicant] had supervisory responsibility to ensure that his subordinate in charge of finance and administration, was fully conversant with all related rules and regulations, including the need for detailed procurement schedules and payments in large construction contracts. In the absence of [the Representative] while on leave or on mission, he is guilty of failing to exercise his supervisory authority over subordinates involved in procurement, leading to overpayments to sub-contractors and to the architect in the order of 20-30% above the market price;

D. [The Applicant] is guilty of failing to act immediately upon receipt of a bribe from [the Administrative Assistant]. His delay in further reporting the matter when he knew that [the Representative] had chosen to ignore the incident, further implicated him in irregularities within the office;

E. [Participating in a meeting in March 2000,... confirming his involvement in a bribery scheme and his attempts to foster a new scheme with the Representative, involving UNFPA construction projects.] [The Applicant] is guilty of the charge of bribery. He is clearly boastful on the tape of his involvement in setting up a bribery scheme within the office. He admits to having received monies from an earlier publishing contract ...

... ADVICE OF THE AD HOC DISCIPLINARY COMMITTEE TO THE ADMINISTRATOR

In view of the above evidence and counter-evidence, and in the absence of any mitigating circumstances, the Committee finds [the Applicant] guilty of serious misconduct and recommends that the decision of summary dismissal be upheld and that UNFPA reserves its right to recover from [the Applicant] the bribes, losses and overpayments which occurred in this case and to which he was party."

On 21 December 2000, the Administrator, UNDP, transmitted a copy of the report to the Applicant and informed him that he had decided to maintain the decision to summarily dismiss him.

On 16 February 2001, the Applicant requested review of the decision of the Administrator who, on 11 May 2001, advised him that the decision stood.

On 29 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions in are:

1. The Applicant was a scapegoat for the irregularities committed by the Representative.

2. The Applicant's rights of due process were violated throughout. In particular, he was not given a copy of the audit report or his statements to the auditors and he was not notified of the charges against him; he was convicted based upon an inaccurate transcript; and, he did not have an opportunity to cross-examine the Administrative Assistant.

3. The punishment imposed on the Applicant was disproportionate.

4. The Applicant suffered embarrassment and economic hardship because of the publicity UNFPA gave the case.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was a valid exercise of the Secretary-General's discretionary authority.

2. The Applicant was accorded due process. The contested decision was in no way vitiated by substantive or procedural irregularity, and, the Administration acted correctly in presenting new allegations to the Applicant.

3. The decision was not vitiated by bias, improper motivation, or other extraneous factors.

4. The penalty imposed was not disproportionate to the offence.

The Tribunal, having deliberated on 25 July 2003 in Geneva and from 22 October to 18 November 2003 in New York, now pronounces the following Judgement:

I. The Applicant appeals to the Tribunal to rescind the Administration's decision to separate him from service and requests three years base salary in lieu of reinstatement. He also claims an additional payment of two years net base salary for damage to his reputation and for denial of due process.

II. The case concerns the imposition of a disciplinary sanction based on allegations that (i) the Applicant signed minutes of Contracts Committee meetings which did not take place; (ii) failed to comply with UNFPA procurement procedures in 1998 and 1999 by participating in the irregular award of a contract to an architect; (iii) failed to immediately report receipt of a bribe; and (v) participated in a bribery scheme.

The Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters and has established its own competence to review such decisions only in certain exceptional conditions, *e.g.*, in case of failure to accord due process to the affected staff member before reaching a decision". (See Judgments No. 542, *Pennacchi* (1991); No. 941, *Kiwanuka* (1999).) The Tribunal also held in Judgment No. 641, *Farid* (1994), para. IV, that it will intervene if the administrative action is "vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact".

III. The Applicant claims that his due process rights were denied because (a) he was not provided with a copy of the Audit Report on which the charges against him were based; (b) the most serious charge against him, "Charge E," which was "participating in a bribery scheme related to construction projects" was changed to "confirming his involvement in a bribery scheme and his attempts to foster a new scheme with the Representative involving UNFPA construction projects"; (c) he was found guilty of a charge he never saw until three weeks before the AHDC hearing, based on a tape recording made by a witness he was not permitted to cross-examine, despite UNDP's commitment to arrange a video-conference; and (d) the presentation of an allegedly edited and inaccurate transcript of the tape to the AHDC by the Administration constituted denial of due process.

In the course of his submission, the Applicant invokes UNDP circular UNDP/ADM/97/17 para.2.2, which provides that

> "if an allegation of misconduct is made, the affected staff member shall be notified in writing of all allegations and of his/her right to respond, provided with copies of all documentary evidence of the alleged misconduct and advised of his/her right to ... counsel".

In Judgment No. 744, *Eren et al.* (1995), para. XV, the Tribunal stated that, "in accordance with the staff rules, as well as fundamental principles of fairness, an accused staff member must be fully apprised of the charges against him/her so as to know what to respond to".

The Tribunal noted that the Applicant was advised that an audit had disclosed irregularities in connection with (i) his signature on minutes and notes to the file of Contract Committee meetings that had never taken place; (ii) his failure to promptly report a bribe; and (iii) his failure to properly oversee the actions of his subordinates, resulting in financial losses to UNFPA. He was provided with a summary of the Audit Report and a copy of the applicable disciplinary rules. He was also advised of his right to seek assistance of counsel and was given an opportunity to submit comments in explanation of his actions. The Tribunal is satisfied that the Applicant had been afforded sufficient information relating to those charges, and thus, his complaints in this regard must fail.

IV. As to the Applicant's complaints that there was undue delay and/or failure on the part of the Administration to make available to him records of prior statements made by him and/or records of interviews, natural justice and due process require that a person facing a charge should be provided with sufficient information as to what is being alleged against him as is required to enable him to make a meaningful answer. This would not ordinarily embrace the Applicant's own statements but rather the statements of other persons who would be giving evidence against him. This is so particularly where his credibility is an issue so that the fact finding body (in this case the AHDC) would be interested to know if there was to be a change in his account or if it would remain consistent. It is not for that body to provide the person under investigation with such resources as he may need to enable him to remain consistent in his evidence or explanation. He has therefore failed to satisfy the Tribunal that his complaints in this regard constitute a denial of due process or show that he was treated unfairly.

V. The Tribunal will now deal with the Applicant's complaint arising from what he describes as a late amendment or addition of the final part of the fifth charge made against him, "Charge E", namely "his attempt to foster a new scheme with the Representative involving UNFPA construction projects". The Tribunal is satisfied that this complaint is without substance, as no finding adverse to him was made in this

regard. In any event, the Tribunal does not consider a three-week notice inadequate, because the amendment in question was largely based on the audio recording and transcript thereof, which had been given to him several months prior to the AHDC hearing. The Tribunal finds that he had adequate time to deal with the charge.

VI. The Tribunal now moves to deal with the charge of "active participation in a bribery scheme", which is said to have been based on the secret recording of the meeting of early March 2000 and which had been carried out by the Administrative Assistant. The Applicant had complained initially regarding the integrity of the tape itself and of the completeness of the transcript and of the accuracy of the translation. It is now accepted by him that the tape itself had not been tampered with, but the Applicant still maintains his complaints regarding the completeness of the transcript and the accuracy of the translation.

This tape had been played to the Applicant following meetings between the Applicant and the Chief, Legal Section that were held on 27 and 28 June 2000. A copy of the tape and the transcript were furnished to the Applicant by the UNFPA Representative, *a.i.*, under cover of a letter dated 28 June 2000. That letter informed him that the tape and transcript disclosed a *prima facie* case of serious misconduct in participating in a bribery scheme, and his comments were invited. The Applicant replied by letter of 17 July 2000. Far from denying that the tape had recorded him as saying at the meeting that he had participated in a bribery scheme, the Applicant firstly objected to the admissibility of the tape recording on the grounds that it had been recorded secretly and without his knowledge and that it had not been taken by a person "authorized to conduct a taped interview". Likewise, he did not immediately complain either about the integrity of the tape or the adequacy or completeness of the transcript. (Later in this same letter, the Applicant made passing allegations regarding the integrity of the tape, but these allegations subsequently have been withdrawn.) When confronted by the evidence of the tape, his reaction was rather to admit that his input was indeed recorded but to explain that he had said what had been said in order to lure the Administrative Assistant to discuss more about the case and to obtain more facts and documents. He described that

> "during [his] discussions with [the Administrative Assistant, he] made an effort to raise [the Administrative Assistant's] confidence in [him] so that he would confide in him all the inner dealings between [the Administrative Assistant] and the Representative and so that [the Administrative Assistant] could share documents of

evidentiary value with him which could prove that the Representative was getting financial benefits".

He says that during the discussion he "was trying to indulge the Administrative Assistant into an open discussion and for that purpose he spoke openly to lure the Administrative Assistant into giving out more facts against the Representative". He concluded his comments on this aspect by saying "[t]his was the only way I could get his confidence to obtain evidence from him. Therefore in the tape recording I have spoken certain words which have been made the basis for my suspension."

The Tribunal can only interpret these explanations and comments which were offered by the Applicant to mean that, at the meeting with the Administrative Assistant, although the Applicant had said that he had participated in a bribery scheme, he was really just bragging or boasting of his involvement in a scheme where he had not actually participated, and he was just inventing this so as to set the Administrative Assistant at his ease, so that the Administrative Assistant might feel comfortable to open up, confess his own misdeeds and, perhaps, also to inculpate the Representative.

In the light of the Applicant's admission as to what he had said on tape, it seems to the Tribunal that the complaints regarding the integrity of the tape, the adequacy of the transcript and the competence and accuracy of the translation and the failure of the Administrative Assistant to attend the video-conference at the meeting of the AHDC, in Bangkok, become of much less importance, generally, and of no importance in relation to what the Applicant actually said. In essence, the words in the letter to the UNFPA Representative, *a.i.*, constitute an admission that at the meeting in question the Applicant had admitted to having participated in a bribery scheme. The issue now remains as to whether he was telling the truth on that occasion or telling the truth in his subsequent explanation to the Acting UNFPA Representative in the Applicant's letter of 17 July 2000, when he had been confronted with the evidence of the tape.

In the opinion of the Tribunal, it seems far fetched in the extreme that the Applicant should have been speaking untruthfully at the meeting with the Administrative Assistant in March 2000, which, unbeknownst to him, was being taped and that his explanation was truthful when he was confronted by the evidence of the tape. The Tribunal finds it impossible to believe that what was said by the Applicant in the course of the tape-recorded meeting at the Administrative Assistant's house was mere bragging about an event which had not occurred, merely done for the purpose of

putting the Administrative Assistant at his ease in the hopes that the Administrative Assistant might open up and admit to his own wrongdoing or implicate the Representative. This explanation would enjoy some plausibility had it been the Applicant or his colleague, the Finance Assistant, who had engaged in the secret tape recording, but it seems to the Tribunal to be a bizarre and wholly implausible explanation when this was not the case. It appears to the Tribunal to be far more plausible that the Applicant was being untruthful when he was confronted by the evidence of the tape recording and required to make an adequate explanation for what he had been recorded as saying at the meeting concerned. In this regard, the Tribunal is reinforced in its conclusion as to the lack of reliability of the Applicant as a witness by reason of his injured credibility arising from his statements regarding a one million rupee bribe. When describing the circumstances of that bribe, the Applicant had changed his evidence in a material respect when he explained the timing of the bribe. Initially, he had claimed that the bribe was collected in September, 1999; later he stated that the bribe was collected in mid-1999, a date which is denied by all other witnesses who corroborated that the Applicant had engaged in the bribery. The Tribunal is satisfied that a basis, independent of the tape and its transcript, exists to support the finding that the Applicant had participated in the bribery scheme, as was charged.

In Judgement No.1009, *Makil* (2001), para.IV, the Tribunal noted that:

> "[It] will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the point of the said finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations."

It also noted in *Makil*, para.V, that

> "It was for the JAB to resolve this credibility issue and it did so in favour of the Executive Director ... In the opinion of the Tribunal, this was an issue of fact pre-eminently and properly suitable for resolution by the JAB, having considered the evidence. The Tribunal considers that it ought to stand as the Applicant has failed to demonstrate either that the finding was not supported by evidence or that the evidence supporting it was false or was not worthy of belief."

VIII. The Applicant argues that his inability to cross-examine the Administrative Assistant violated his rights to due process. Specifically, the Applicant argues that had he been able to cross-examine the Administrative Assistant, he would have been able to wholly undermine the Administrative Assistant's credibility and integrity as a witness. Even if that had been established, this would not affect the Tribunal's findings as to the Administrative Assistant's involvement, since the Tribunal has placed no relevance on the Administrative Assistant's testimony in reaching its conclusion. Since the Tribunal finds implausible the Applicant's explanations for his admissions that he participated in a bribery scheme, and as the Tribunal determines that the Applicant's admissions, coupled with his lack of credibility as a witness, form an independent basis for the conclusion that the Applicant participated in the bribery scheme, any cross-examination of the Administrative Assistant would have no relevance to "Charge E".

IX. The Applicant contends that the purported minutes of meetings of the Contracts Committee, which did not take place, were prepared under the instruction and guidance of the Representative. The Applicant further claims that the prevailing rules of hierarchy and authority made it impossible for him to object to signing these false documents. He added that he was not allowed supervisory authority over staff. The Tribunal finds not credible the Applicant's assertions. It is clear that the Applicant failed to exercise his oversight and supervisory authority over the Senior Administrative and Finance Assistant, and the Administrative Assistant, respectively. This led to major financial and procurement irregularities as well as functional disruption in the office operations, which were not reported to the Representative and Headquarters.

The Tribunal, like the AHDC, does not accept the Applicant's explanation that he was not allowed by the Representative to exercise his supervisory authority over the Administrative Assistant, as constituting a legitimate excuse for his failures. Furthermore, the AHDC, which had seen and heard both the Applicant and the Representative, concluded that the Applicant possessed a strong and robust character: "it would not appear that he was the sort of person who would shy away from challenging authority". Therefore, it did not accept that he had been intimidated by the Representative. The Tribunal also notes that the Applicant joined his colleagues in signing the letter of 8 October 1999, reporting the procurement irregularities committed by the Representative of the UNFPA. This is further evidence of the

Applicant's strong and robust character, which provides further ground for rejecting his assertion that he acted out of fear of reprisal.

X. In the light of the foregoing, the Tribunal finds that arguments presented by the Applicant are not convincing. Consequently, it upholds the finding that the Applicant (i) participated in a bribery scheme; (ii) failed to comply with UNFPA procurement procedures; (iii) conspired to conceal the irregularities by signing documents of Contracts Committee meetings that did not take place, (iv) that the Applicant's failure to exercise his supervisory authority over subordinates involved in procurement led to overpayment to sub-contractors and to the architect in the order of 20-30% above market price; and (v) that the Applicant failed timely to report receipt of a bribe.

XI. Accordingly, the Tribunal rejects the Application in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 18 November 2003

Maritza **Struyvenberg**
Executive Secretary